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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 700.

JOHN H. PAGE, Trustee,

Petitioner,

against

ARKANSAS NATURAL GAS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

JOHN W. DAVIS,
ROBERT S. SLOAN,
JEFF DAVIS,
J. MERRICK MOORE,
Counsel for Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

Opinions of the Courts Below.

The District Court's opinion is not reported. It appears at page 92 of the Record. The opinion of the Circuit Court of Appeals is reported in 53 Fed (2nd) 27, and is printed at page 200 of the Record.

Statement of the Case.

This is a suit in equity brought by the petitioner to adjudicate the title of a forty-acre oil lease, known as the Bilyou lease, and for an accounting for the oil proceeds realized therefrom (R. 3). The petitioner seeks this relief as trustee

of a "business trust", designated the "Mike Lyvers Syndicate" (R. 16). The bill was originally filed in a state court of Arkansas against the Natural Gas and Fuel Corporation, to which the present respondent is successor in interest. The cause was later removed to the Federal Court of the Western District of Arkansas (R. 15).

On a motion to dismiss the complaint, the District Court rendered a judgment on the complaint and its exhibits dismissing the complaint on the ground that it failed to state a cause of action. An appeal was prosecuted to the Circuit Court of Appeals for the Eighth Circuit and the judgment of the District Court was reversed (35 Fed. (2nd) 462).

At this stage of the litigation, the Arkansas Natural Gas Corporation, the present respondent, was substituted for the Natural Gas and Fuel Corporation (R. 49); and, for the first time, an answer was filed to the petitioner's complaint (R. 88). Pleaded, among others, were the defenses of *res adjudicata* and laches. *Res adjudicata* was based on two separate proceedings in which title to this lease was tried before a Referee in bankruptcy: (1) the intervention of petitioner's predecessor trustee, Mike Lyvers, and (2) the intervention of one Zug and two other unitholders or *cestuis que trustent*, suing, in a class action, for themselves and all others beneficially interested. In each proceeding the Referee adjudicated that title to the Bilyou lease was in the Trustee in Bankruptcy through whom the respondent now holds (R. 32, 82). The order of the Referee in the first intervention was affirmed by the District Court (R. 34). In the second proceeding, no review of the Referee's decision by the District Court was even sought by the unitholders.

Upon joinder of issues, the District Court proceeded to hear the case on the merits; many witnesses were heard; and

voluminous evidence introduced (R. 91). On the full and complete record, the District Court dismissed the complaint on the merits, making certain findings of fact and conclusions of law (R. 124). In substance, the District Court concluded: (1) that the summary order of the Referee, and its affirmance on review, constituted a judgment binding upon Mike Lyvers, as Trustee of Mike Lyvers Syndicate and on the petitioner, his successor trustee; (2) that the denial by the Referee of the petition of Zug, *et al.*, on behalf of themselves and all other unitholders of the Mike Lyvers Syndicate, was a judgment binding not only upon Zug *et al.* but also upon all other unitholders and the petitioner; and (3) that Mike Lyvers, as Trustee of the Mike Lyvers Syndicate, and petitioner, as successor trustee, and the unitholders of the Mike Lyvers Syndicate were guilty of laches in asserting their claims to the Bilyou lease (R. 123-124).

On appeal to the Circuit Court of Appeals for the Eighth Circuit the judgment of the District Court was unanimously affirmed (R. 200-221). The Circuit Court of Appeals rested its decision on the ground that the question of title was *res adjudicata* by virtue of the decision of the Referee in Bankruptcy, as affirmed by the District Court, in the Mike Lyvers intervention (R. 205). In view of this determination, the Court found it unnecessary to consider the plea of *res adjudicata* with respect to the petition of Zug *et al.*, or to decide the question of laches. Upon denial of his motion for rehearing (R. 228), the petitioner then applied to this Court for a writ of certiorari invoking jurisdiction under Section 248 of the Judicial Code as amended by Act of February 13, 1925, c. 229; 43 Stat. 936, 938. On March 21, 1932, this Court granted the writ of certiorari (R. 233).

Facts.

For the convenience of this Court the facts as found by the District Court and affirmed by the Circuit Court of Appeals in its opinion are here set forth with Record references.

The Mike Lyvers Syndicate was promoted and organized by Harry N. Morris, David Morris and Otto Morris, promoters who operated in the vicinity of Eldorado, Arkansas (R. 135, 136). Employed by them as a laborer was one Mike Lyvers, an inexperienced youth about twenty-one years of age (R. 136, 139, 140). Use was made of his name to designate this new Syndicate, and he was appointed Trustee under a declaration of trust of February 21, 1923 (R. 16, 129). Beneficial interests in the trust were sold in units of ten dollars each, and 14,400 of such units were ultimately distributed to the public (R. 126). By the provisions of the declaration the Trustee was given full and complete and absolute powers to manage, control and operate the affairs of the trust and its properties (R. 22, 23, 25). It was provided that complete legal title to such properties which might thereafter be acquired would be vested in Mike Lyvers, as Trustee (R. 22). Absolute power was given to Lyvers to dispose of the trust property as he saw fit; and to merge the trust on such terms and under such conditions as he desired—these powers to be exercised without the consent or even the knowledge of the unitholders (R. 25). To him also was given the power to appoint his successor trustee (R. 23). For compensation the Trustee was to receive 25% of the profits (R. 24).

The Mike Lyvers Syndicate was but one of several projects promoted and administered by the Morrises, the dominant

enterprise being a similar business trust called the Harry Morris Guaranteed Gusher Syndicate No. 3 (hereinafter referred to as Gusher Syndicate), of which Harry N. Morris was Trustee (R. 135, 136). From the time of its creation, the Lyvers Syndicate, its money and properties were administered by the Morrises in connection with the affairs of the Gusher Syndicate (R. 135, 136). Mike Lyvers had nothing to do with the actual management of the affairs of the Mike Lyvers Syndicate or with the conduct of its operations in the field (R. 136, 139, 140). By power of attorney he had given one of the Morrises full authority to act for him as Trustee (R. 137). Two of the Morrises were vested with power to check on the Mike Lyvers Syndicate bank account (R. 138). In Lyvers own words, his "signature was not even good at the bank" (R. 141). Not until after the receivership did Mike Lyvers even file with the bank a signature card of his own (R. 139). The properties of the Gusher Syndicate, the Morris Drilling Company and those standing in the name of Mike Lyvers, as Trustee of the Mike Lyvers Syndicate, were managed and conducted as a unit by Harry N. Morris, Otto Morris and Dave Morris (R. 136). Mike Lyvers all the while was working solely on a salary basis for the Morrises (R. 136, 140, 141, 142, 144). Even the prospective 25% profits which would accrue to him as Trustee was to go to the Morrises (R. 141).

During the entire life of the Lyvers Trust there was a commingling of assets of the Mike Lyvers Syndicate and the Gusher Syndicate. Bills for the operation of all the producing properties in the name of Mike Lyvers, Trustee, were paid by the checks of the Gusher Syndicate and of the Morris Drilling Company (R. 135, 136, 139, 140). No credit was extended to Mike Lyvers, as Trustee, by the various concerns

furnishing supplies for the operation of the Mike Lyvers Syndicate properties—the Lyvers Trust not being known to those who furnished material, labor or other credits for field operations. In fact the Assistant Production Foreman for the Morrises and the man in charge of buying the materials for the leases, including those standing in the name of Mike Lyvers, Trustee, never charged anything to Mike Lyvers Syndicate and never knew that Mike Lyvers was a Trustee of those properties (R. 139).

Among the properties eventually standing in the name of Mike Lyvers, Trustee, were the Bilyou, Jonette and Mullens leases (R. 144). The Jonette and Mullens leases were oil producing properties. The Bilyou was a rank "wildcat" lease (R. 146), assigned to Mike Lyvers, Trustee, by Otto Morris, 20 acres on April 4, 1923, and the remaining 20 acres on July 2, 1923 (R. 26, 28). The Bilyou lease was acquired by Morris from C. H. Murphy, who retained an overriding royalty of $32,000 to be paid in oil (R. 131). Murphy had acquired the Bilyou lease through mesne conveyances from J. A. Bilyou and wife, who retained the customary one-eighth royalty (R. 131).

By the end of August, 1923, the Morrises and their projects were in serious difficulties. At the suit of creditors, a receiver, one L. H. Williford, was appointed for the Gusher Syndicate by order of the Chancery Court of Union County, Arkansas (R. 141). On August 28, 1923, Williford took possession and endeavored to unsnarl the tangled affairs of the syndicates (R. 142). The account books were never found (R. 142, 143). The papers which he did find plainly showed that the properties of the Mike Lyvers Syndicate and the Gusher Syndicate had been intermingled, and operated as a unit. In order to work out justice to the creditors, he

concluded that the properties of the Lyvers Syndicate should come under his receivership. Mike Lyvers promised to turn over to him as receiver all the property standing in his name as Trustee, and thereafter did execute to Williford, as receiver, a quitclaim deed conveying the Mullens lease (R. 142). His promise to assign the other properties was not carried out (R. 142). In order to meet the claims of creditors, Williford planned a sale of all the Morris properties, including the Bilyou lease. In early September Harry N. Morris, Otto Morris and Mike Lyvers were indicted for conspiracy to defraud the unitholders in the promotion of the Mike Lyvers Syndicate. In October, Lyvers pleaded guilty, and the sentence imposed was a fine (R. 117).

Certain unitholders having learned of the State Receivership, evolved a reorganization plan for the purpose of paying off the creditors and reacquiring all of the Morris properties, for the benefit of all the unitholders interested in the various Morris syndicates (R. 155, 156). Accordingly, a reorganization committee of unitholders in the Morris syndicates was formed. This committee engaged one Dr. McComb to effectuate a plan (R. 155, 156).

To prevent the sale of the Morris properties by Williford, the several members of the reorganization committee filed, on November 23, 1923, an involuntary petition in bankruptcy (R. 159, 187), and on December 24, 1923 (R. 187), the Gusher Syndicate was adjudicated a bankrupt by the District Court of the Western District of Arkansas. Harry N. Morris, on voluntary petition, was adjudicated a bankrupt the latter part of December (R. 187). Both bankruptcy proceedings were referred to a Referee, who consolidated them. One H. M. Barney, who in November had been appointed Receiver

for the Gusher Syndicate, was elected on January 8, 1924, Trustee in Bankruptcy for the Gusher Syndicate and Harry N. Morris, bankrupts (R. 142, 187).

Upon his appointment in November, as Receiver in Bankruptcy, Barney took possession of all the properties in the custody of Williford, the State Receiver (R. 142). He proceeded to take actual possession, so far as possible, of the properties of the "Morris" syndicates, including those of the Mike Lyvers Syndicate (R. 142, 143). In the case of producing properties he took over their operation (R. 144); and in the case of non-producing properties he took possession by going on each lease and posting placards with inscriptions to the effect that the property was in the possession of H. M. Barney, as Trustee, of the Federal District Court of Texarkana Division sitting in bankruptcy (R. 143).

The Bilyou lease at the time was an unexplored and non-producing lease (R. 143). Barney entered upon the Bilyou farm and set up placards as notices of his possession. The Jonette and Mullens leases, also properties standing in the name of Mike Lyvers, Trustee, for the Mike Lyvers Syndicate, were taken over and operated by Barney (R. 144). When the annual lease rental fell due on the Bilyou lease, Barney, then Trustee in Bankruptcy, paid it (R. 147, 151).

In February, 1924, Mike Lyvers filed an intervention before the Referee in Bankruptcy in which he alleged that Barney, the Trustee in Bankruptcy, had taken *possession* of and was administering certain property belonging to him. The prayer of the intervention was that the Trustee in Bankruptcy be required to turn over to Lyvers all the producing properties belonging to the latter, and that the Trustee be restrained from selling any of the properties (R. 31). At-

tached to the intervention was an exhibit containing a list of the properties claimed by Lyvers, which list included the Bilyou lease. These leases, including the Bilyou lease, were described specifically. In the following and concluding paragraph appeared the significant words, praying for the return of "any other properties recorded in Mike Lyvers Syndicate and Mike Lyvers, Trustee, in Union and Ouachata Counties, Arkansas" (R. 32).

On February 15, 1924, the Trustee in Bankruptcy filed a response to the intervention, admitting possession of the property claiming it as property of the bankrupt estate, and denying the claims of the intervenor (R. 59, 155). On the same day the Trustee in Bankruptcy also filed a counter-petition for a summary order requiring Lyvers to execute a quitclaim deed conveying the leases to him as Trustee in Bankruptcy (R. 60). The Bilyou lease in the counter-petition was fully described as one of the properties for which a quitclaim deed was sought. The allegations of the counter-petition were that the leases in question were purchased with the moneys and assets of the bankrupt estate and that, although they were taken in the name of Mike Lyvers, he only held them as Trustee for the benefit of the bankrupt estate; that Lyvers had no funds with which to pay for said leases and did not pay for them; that Lyvers at the time was in the employ of Harry Morris as Trustee for the Gusher Syndicate; and that the assigning of the lease to Mike Lyvers was a violation of trust by Morris under his declaration of trust (R. 60, 61, 155).

The intervenor appeared by attorneys who examined all witnesses (R. 33). After the hearing had progressed and testimony taken, the intervenor sought to withdraw on his own motion to dismiss. This motion was denied (R. 32).

Testimony was taken by the Referee in Bankruptcy concerning the matters set forth in the petition, the response thereto and the counter-petition for a summary order (R. 33).

With respect to the principal question presented on the intervention, the Referee ruled that the intervention should be denied on the ground that all the property claimed by Lyvers was purchased by funds of the bankrupt Gusher Syndicate derived from the sale of units in the trust estate of that Syndicate, and that these leases were merely being held by Lyvers, who had no interest in them otherwise, for the benefit of the bankrupt estate. The Referee found and recited in his order that the promoters of the Syndicate had handled all of the properties in the names of the various Syndicates for their own convenience; that the properties all belonged to a common fund; and that the assets could not be segregated, being badly commingled and hard to trace, due to the absence of the books of the various Syndicates, including those of the bankrupt (R. 32, 131).

On petition to the District Court, the order was affirmed requiring Lyvers to convey by quitclaim deed the properties in question to Barney, as Trustee in Bankruptcy (R. 34, 35). Accordingly, a quitclaim deed was executed on October 13, 1924, by Mike Lyvers personally and as Trustee for Mike Lyvers Syndicate, conveying the properties, including the Bilyou lease, to Barney as Trustee in Bankruptcy (R. 40).

On January 27, 1925, the Trustee in Bankruptcy entered into a written contract with Natural Gas and Petroleum Corporation to sell for the consideration of $125,000 the remaining properties in the Trustee's hands, the Bilyou lease being one of them (R. 145). This contract was approved by the Referee and duly recorded (R. 146). At the time of the execution of the contract the Bilyou lease was unexplored.

The Trustee had been unsuccessful in his efforts to sell it because its value was purely speculative and because it was burdened with an overriding royalty of $32,000 in oil. His best offer for it had come from C. H. Murphy, the owner of the overriding royalty, who had offered $1,000 for the lease. This offer the Trustee, though authorized to accept, refused (R. 146).

Under the terms of the contract, the Natural Gas and Petroleum Corporation was given thirty days in which to examine title to the various properties (R. 145, 146). In examining the title to the Bilyou lease the purchaser's attorney discovered a misdescription in the prior quitclaim deed of October 13, 1924, given by Mike Lyvers as Trustee, for the Mike Lyvers Syndicate, to the Trustee in Bankruptcy (R. 40, 41). In that quitclaim deed the Bilyou lease had been misdescribed as being in Section 9, Township *15* South, Range *16* West, Union County, Arkansas (R. 41), when, as a matter of fact, the land covered by the lease was located in Section 9, Township *16* South, Range *15* West (R. 151). Accordingly, the Trustee in Bankruptcy obtained the execution of a second quitclaim deed by Mike Lyvers as Trustee of the Mike Lyvers Syndicate, correctly describing and conveying the Bilyou lease to H. M. Barney, as Trustee in Bankruptcy, for the Gusher Syndicate, and Harry N. Morris, bankrupts. The deed was executed, acknowledged and recorded in Union County, Arkansas, February 20, 1925 (R. 149, 150, 151).

On March 2, 1925, the Natural Gas and Petroleum Corporation paid the balance of the purchase price making the entire money consideration $125,000, and a deed of assignment, conveying all the properties, including the Bilyou lease,

was executed by H. M. Barney, as Trustee in Bankruptcy, to the Natural Gas and Petroleum Corporation (R. 43, 149).

During all this time the Reorganization Committee of the unitholders was busy trying to save the situation (R. 156-160). The plan evolved by the Reorganization Committee was to organize a corporation called the Moco Oil Corporation, and to obtain an exchange of shares in the Corporation for the units held by the unitholders of the several Morris Syndicates, including the Mike Lyvers and Gusher Syndicates (R. 160). The ultimate purpose, of course, was to raise money by a subsequent bond issue to purchase, for the benefit of all unitholders, the best of the properties held by the trustee in Bankruptcy. Wide publicity was given to this plan (R. 160).

From November, 1923, to April, 1924, the unitholders of all the Morris properties, including the Mike Lyvers Syndicate, were circularized with notices calling for meetings in various strategic points in the country. Dr. McComb was personally present at about sixteen of these meetings, all held in different cities of the United States (R. 156, 157). By his efforts and those of others, the unitholders were advised of the situation existing in Arkansas; and notice was brought home to the unitholders of the Mike Lyvers Syndicate that the properties of that Syndicate were being administered in the Bankruptcy Court, together with the properties of the other Syndicates (R. 156, 157, 158).

In January, 1924, the Reorganization Committee mailed out to all the unitholders, including those of the Mike Lyvers Syndicate, a form of proof of claim in bankruptcy to be used by the unitholders in filing their claims as creditors in the matter of the Gusher Syndicate and Harry N. Morris,

bankrupts (R. 158). Dr. McComb had obtained and compiled a list of the unitholders of Mike Lyvers Syndicate and of the Gusher Syndicate, duplicates of those on file in the Bankruptcy Court (R. 126, 152, 156).

In April, 1924, the Reorganization Committee organized, as planned, the Moco Oil Corporation (R. 157). A newspaper called the *Moco News* was mailed each month from May, 1924 up to and including April, 1925, to every unitholder whose name appeared on the list of the Gusher and Lyvers Syndicates for the purpose of keeping the unitholders advised concerning developments (R. 157). The Moco Oil Corporation also mailed a letter to all unitholders stating that it was formed for the purpose of acquiring the "Morris properties" from the Trustee in Bankruptcy (R. 160). The letter expressly stated that "Only Morris, Boone and Lyvers unitholders can share in these properties" (R. 160). A substantial majority of the unitholders of the Lyvers Syndicate executed powers of attorney framed to empower Dr. McComb to represent the unitholders and act in all matters pertaining to the properties of the Lyvers Syndicate (R. 158, 159).

In an issue of the November, 1924, *Moco News*, Dr. McComb listed all of the properties that the Moco Oil Corporation had already purchased from the Trustee in Bankruptcy and listed also the properties which he expected to buy from him. Knowledge of the fact that the Trustee in Bankruptcy had taken possession of the Bilyou lease was brought home to the unitholders of the Mike Lyvers Syndicate by the fact that among the properties to be purchased was listed the lease here in controversy, described as "J. A. Bilyou Farm Northwest ¼ Northwest ¼ 9-6-16-15 Union County, Arkansas" (R. 159).

In October 1924 the Referee in Bankruptcy mailed to each unitholder, including the Lyvers unitholders, a card notifying them to file their claims in bankruptcy as deferred creditors of the estate (R. 58, 152). By January 1, 1925, unitholders representing more than 10,000 units of the Mike Lyvers Syndicate, or more than 5/7ths of all the units issued, came in and filed their claims as deferred creditors in the bankruptcy proceedings. All of these claims were allowed and a dividend was paid on each of them (R. 147). Thereafter, from time to time, the Referee mailed out to all the unitholders, including those of the Lyvers Syndicate, other notices of the progress of the bankruptcy proceeding (R. 153, 154).

On February 12, 1925, Dr. McComb caused a petition to be filed on behalf of the Moco Oil Corporation to restrain the Trustee in Bankruptcy from selling the "Morris properties" to the Natural Gas and Petroleum Corporation until the Moco Oil Corporation had a reasonable opportunity to raise $155,000 for its purchase, and prayed in the alternative that the contract between the Trustee in Bankruptcy and the Natural Gas and Petroleum Corporation be set aside (R. 160, 161). Simultaneously the Moco Oil Corporation mailed to each of the unitholders, including the Lyvers unitholders, a full copy of the petition (R. 160, 161).

On March 18, 1925, at the instance of Dr. McComb, a petition was filed by one Zug and two other unitholders of the Mike Lyvers Syndicate to set aside the sale of the Bilyou lease to the Natural Gas & Petroleum Corporation, on the ground that it was the property of the Mike Lyvers Syndicate and in no way the property of the Gusher Syndicate and Harry N. Morris, bankrupts; and in the alternative, for an accounting of the moneys in the hands of the Trustee in

Bankruptcy, which represented the proceeds of sale of the Bilyou lease, the Mullens lease, and the Jonette lease (R. 62, 154, 155). The petitioners alleged that they were filing the petition as a class proceeding, on behalf of themselves and all other unitholders of the Mike Lyvers Syndicate. A response was filed by the Trustee in Bankruptcy; and upon the submission of the matter to the Referee the petition was denied (R. 72, 82, 155). The petitioning unitholders sought no review of this order by the District Court. In the April 1925 issue of the *Moco News* there appeared an account of the proceedings relating to the Zug *et al.* petition. This issue was mailed to all the unitholders, including those of the Mike Lyvers Syndicate (R. 162, 163).

Interest at this time centered upon the Bilyou lease for the reason that deep oil had recently been discovered in the Smackover field. Although none of the discovery wells were in the immediate vicinity of the Bilyou lease, they had affected its speculative value (R. 187). At the trial it was proved that on March 12, 1925, the Bilyou lease had a value of about $6,000 over and above the oil payment charge of $32,000, which was against it (R. 186). The first well drilled upon the Bilyou lease was completed on April 18, 1925, and proved to be a gas well. Four other wells were drilled, three of them completed as producing oil wells in the early part of May, the fourth never being completed (R. 182). The expenses incurred in the development and operation of the Bilyou lease from March 1925 to January 1928 approximate $221,000 (R. 184, 185). The estimated value of the Bilyou lease as of May 10, 1925, was between $600,000 and $800,000 (R. 185-188).

Late in the summer of 1925 Dr. McComb, desiring to institute suit against the Natural Gas and Petroleum Corpora-

tion to recover the property of Mike Lyvers Syndicate, including the Bilyou lease, held several conferences with Mike Lyvers, at which he sought to get Lyvers to resign and appoint him, McComb, as his succesor Trustee for Mike Lyvers Syndicate (R. 163). Though fully empowered to do so, Lyvers refused to appoint Dr. McComb (R. 163, 164). In October, however, Mike Lyvers executed an instrument by which he purported to resign as Trustee of Mike Lyvers Syndicate and to appoint John H. Page his successor Trustee (R. 130).

On October 19, 1926, suit was brought in the District Court of the Eastern District of Arkansas, which suit was similar to the one at bar. This suit was dismissed on April 18, 1927, for lack of jurisdiction (R. 188). The present suit was instituted on December 20, 1927 (R. 9).

Summary of Argument.

POINT I. The adjudication of title to the Bilyou lease in the intervention of Mike Lyvers in the bankruptcy proceedings in 1924 constitutes *res adjudicata*. The Bankruptcy Court had jurisdiction to try title in summary proceedings: (1) because the property sought to be reclaimed was in the possession of the Trustee in Bankruptcy; and (2) because the adverse claimant consented to summary proceedings by his own intervention. Though Mike Lyvers was not designated as Trustee of the Mike Lyvers Syndicate in the proceedings in the Bankruptcy Court, he, nevertheless, was litigating the same issues and relying upon substantive rights identical with the claims asserted by the petitioner, as successor in title. Lyvers never held any title or claim to the Bilyou lease except as trustee; had never done any

act in relation thereto except as trustee; and had never claimed it as his individual or personal property. At the hearing before the Referee, upon his intervention, it was fully understood that he was claiming as Trustee; and the issue tried was the question of ownership between the bankrupt estate of the Gusher Syndicate, represented by the Trustee in Bankruptcy, on the one hand, and Lyvers as Trustee of the Mike Lyvers Syndicate, on the other. The *cestuis que trustent* were not necessary parties to the bankruptcy proceeding in order to make the decision in that case binding upon the *cestuis* and upon the petitioner, now their representative in the present action. Title to the Mike Lyvers Syndicate properties, including the Bilyou lease, passed by merger to the Gusher Syndicate even before its adjudication in bankruptcy. The equities are with the creditors of both Syndicates and this respondent.

POINT II. The proceedings upon the petition filed by Zug, *et al.*, in a class proceeding for the benefit of all unitholders of the Mike Lyvers Syndicate constitute *res adjudicata*. Jurisdiction was vested in the Bankruptcy Court to hear and determine a petition to set aside a sale of property made by the Trustee in Bankruptcy when the property was then in his possession; and a prayer, in the alternative, for the return of the proceeds of sale in the hands of the Trustee. The issues and subject matter in that proceeding and in this suit are essentially the same. The Referee's order denying the petition was binding upon the unitholders as a class and upon their present representative, the petitioner.

POINT III: The petitioner and the unitholders of the Mike Lyvers Syndicate are estopped by laches to maintain this action. All of the elements of laches are present: (1) the

invasion of the rights (assumed arguendo) of the party claiming to be owner; (2) notice on his part of such invasion; (3) delay in the prosecution of his rights; and (4) circumstances rendering it inequitable to grant the relief prayed for. The invasion, if any, occurred four years before the institution of the instant suit. Both Mike Lyvers and the petitioner, as successor Trustee, had notice of this invasion. The unitholders acquiesced. Indeed, over two-thirds of them had knowledge by the acceptance of dividends on their claims as deferred creditors of the bankrupt estate. This action was not brought until a year and a half after the Bilyou lease had been fully developed into valuable oil property. All the risk of exploration was borne by respondent's predecessor. It would be inequitable to permit the petitioner thus to profit from respondent's capital and enterprise.

ARGUMENT.

Introduction.

The petitioner elects to stand on his brief in support of certiorari. An attempt is there made to create the impression that there has been a lack of unanimity by the Judges who have passed upon the questions here presented. This is not the situation. These essential questions have been unanimously decided by all the courts which have considered them —from the Referee in Bankruptcy and the District Court affirming his order, the District Court which heard this case on the merits, to the Circuit Court of Appeals unanimously affirming the judgment on the merits.

Because the petitioner persistently refers to the decision of the Circuit Court of Appeals passing on the sufficiency of the complaint alone, we feel it incumbent on us to point

out that the issues decided by the Circuit Court of Appeals on that appeal differ distinctly from those decided on the second appeal. The latter issues, quite obviously, are the only ones now before this Court for review.

The Circuit Court of Appeals on the first appeal, reported in 35 Fed. (2nd) 462, had before it the single question whether the facts stated in the bill, if taken as true, showed a cause of action. The bill set forth that the Mike Lyvers Syndicate was a separate and distinct entity; that the Morris Guaranteed Gusher Syndicate No. 3 had no right, title or interest in or to the leases standing in the name of Mike Lyvers Syndicate; that in the intervention proceedings instituted by Mike Lyvers he appeared in his personal capacity only and not as Trustee; and that the order made by the Referee and affirmed by the District Court affected Mike Lyvers in his personal capacity only and not as Trustee. The Circuit Court of Appeals held that a bill alleging these facts was sufficient as a pleading.

The actual facts developed by evidence at the trial disclose a situation entirely different from that presented in the complaint. This both the Courts below fully recognized and so found.

It now appears that Mike Lyvers was Trustee of the Lyvers Syndicate in name only. "The evidence shows that from the time the Lyvers Syndicate was created its moneys and properties were administered by the Morrises in connection with their administration of the affairs of the Gusher Syndicate. Lyvers, as trustee, had no credit extended to him—he was merely a straw man" (53 Fed. (2d) 27, 38). The findings of the Court show beyond question that the Mike Lyvers Syndicate was not a *bona fide* separate entity. "Credit for carrying on the operations of the Lyvers Syndicate was ex-

tended either to the Gusher Syndicate or to the Morrises. Bills for the operation of the producing properties in the name of Mike Lyvers, trustee, were paid by checks of the Gusher Syndicate and of the Morris Drilling Company" (53 Fed. (2nd) 27, 38).

The statement in petitioner's brief (p. 28) to the effect that "The evidence in this case showed that at all times the two Syndicates were separate and distinct, and whatever payments were made by the Morris Syndicate on behalf of the Mike Lyvers Syndicate were repaid by the Mike Lyvers Syndicate" (R. 188, 191) is contrary to the record and the express holdings of the Courts below. With respect to the few repayments made by the Lyvers Syndicate the Circuit Court of Appeals said (53 Fed. (2nd) 38):

> "Some reimbursements were made by the Lyvers Syndicate to the Gusher Syndicate or the Morrises for expenses incurred. However, the checks therefor were drawn by the Morrises themselves."

The testimony of Lyvers taken on an intervention at an earlier date in his claim for back salary due him from the Morrises was to the effect that he was a mere employee; that the Mike Lyvers Syndicate and the Gusher Syndicate were operated as one organization; that he had no interest whatever in the property of the Lyvers Syndicate; and that the property nominally owned by the Mike Lyvers Syndicate was really owned by the Harry Morris Guaranteed Gusher Syndicate No. 3 (R. 140, 141).

Thus an entirely different situation was developed by the evidence introduced at the trial disclosing the real status of Mike Lyvers, as Trustee; the relationships of the Morris brothers and all of their associated syndicates; and the relation of the syndicates, one to another.

The attitude and actions of the unitholders of the Mike Lyvers Syndicate were in the record for the first time. The Circuit Court of Appeals, in its opinion (p. 38), speaks of "the almost complete acquiescence by the unit holders in the administration of the Lyvers property as part of the bankrupt estate"—this no doubt with reference to the fact that unitholders representing more than 10,000 units filed their claims in the Gusher Syndicate bankruptcy proceedings, and also to the fact that from November 23, 1923, when the Committee of the Morris unitholders put the Gusher Syndicate into bankruptcy, to April, 1925, even those unitholders who failed to file their claims were fully informed by communications from the Committee and the Referee in Bankruptcy of the possession and administration of the properties of the Mike Lyvers Syndicate by the Bankruptcy Court (R. 147, 156-163).

Finally, it appears in the record of the trial on the merits that all the parties, Mike Lyvers, Barney, the Trustee in Bankruptcy, Pope, the Referee in Bankruptcy, and the District Court fully understood that the justiciable issue presented in Mike Lyvers' intervention concerned the adjudication of title between the Trustee in Bankruptcy, representing the creditors of the Morris properties, and Mike Lyvers, as Trustee of the Mike Lyvers Syndicate.

POINT I.

The adjudication of title to the Bilyou lease in the intervention of Mike Lyvers in the bankruptcy proceedings constitutes *res adjudicata*. The bankruptcy court had jurisdiction to try title; because the property was in the possession of the Trustee in Bankruptcy; and because the adverse claimant consented to summary proceedings by his intervention. The issue of title tried upon the intervention was actually between Mike Lyvers as Trustee of the Mike Lyvers Syndicate and Barney, Trustee of the Bankrupt Estate.

A.

SUMMARY JURISDICTION OF THE BANKRUPTCY COURT.

(1) *Possession of the Bilyou lease was in the Trustee in Bankruptcy.*

The District Court found as a fact that possession of the Bilyou lease was taken in November, 1923, by Barney, then Receiver, and later Trustee in Bankruptcy (R. 120). The Circuit Court of Appeals held that this finding was supported by the evidence (53 Fed. (2nd) 27, 35).

Upon his appointment as Receiver of the Bankrupt's estate, Barney immediately took over the properties standing in the name of the Mike Lyvers Syndicate (R. 142). He operated the Jonette and Mullens leases which were then producing

oil (R. 144). See *In re Hoover-McClintock Motor Car Co.*, 1 Fed. (2nd) 660, 661, wherein the Court said:

> "Possession of any material part of the *res* gave the referee jurisdiction to determine the validity of the deed of trust affecting such property".

Barney also entered upon the forty-acre Bilyou tract and posted it with placards stating that it was in his possession as Receiver in Bankruptcy (R. 143). The Bilyou lease had never been drilled. It was vacant and unexplored. Barney as Trustee in Bankruptcy drilled no wells on it. But he did all that was humanly possible, short of actual drilling, to exercise dominion over the lease. He asserted title to all of the properties standing in the name of Mike Lyvers as Trustee. He paid the annual lease rental for the Bilyou lease when it fell due in order to keep the lease as an asset of the bankrupt estate.

We respectfully submit that the rule stated by the Circuit Court of Appeals applies here:

> " 'Where property is incapable or difficult of manual delivery, the officer may not be required to take actual possession thereof; but some notorious act, as nearly equivalent to actual seizure as practicable must be substituted, and such steps taken as will fasten the property in the hands of the person who has possession or control, to await the judgment in the case, or such person must be required to place it in the hands of the court.' " [53 F. (2nd) 27, 35.]

See also *O'Dell* v. *Boyden*, 150 Fed. 731; *In re Cochran*, 40 Fed. (2nd) 282, 284; *In re Jones*, 42 Fed. (2nd) 269.

The intervening petition by Mike Lyvers in the bankruptcy proceedings contained an admission of possession by the trustee in bankruptcy (R. 31). The unitholders, individually,

and through the acts of their Committee, fully recognized this possession (R. 147, 156-159).

In his intervention, Lyvers claimed title to all other properties standing in the name of Mike Lyvers Syndicate and Mike Lyvers, Trustee (R. 32). The purpose of the intervention was to litigate the adverse claims of Lyvers, Trustee, to the properties of the Lyvers Syndicate. These included the producing Jonette and Mullens leases which at the time were being operated by the Trustee in Bankruptcy (R. 144). Jurisdiction of the Bankruptcy Court over the producing leases cannot be challenged. For the purposes of said intervention, we respectfully submit that the Referee likewise had summary jurisdiction over leases not operated, but posted with notices of the entry, claim of title and possession by the Trustee in Bankruptcy.

Possession by a Trustee in Bankruptcy is sufficient to confer upon a Court of Bankruptcy the power to proceed by summary proceedings and that possession may be either actual or constructive. *Taubell, etc.,* v. *Fox,* 264 U. S. 426, 432; *Murphy* v. *Hofman Co.,* 211 U. S. 562; *Priest* v. *Weaver* (C. C. A. 8th), 43 Fed. (2nd) 57, 59; *Jack Stolkin, Inc.* (C. C. A. 2nd), 42 Fed. (2nd) 829; *In re Midland Oil Co.* (C. C. A. 5th), 3 Fed. (2nd) 112, 113; *Orinoco Iron Co.* v. *Metzel* (C. C. A. 6th), 230 Fed. 40, 44.

(2) *Consent to Summary Proceedings.*

In addition to the jurisdictional fact of possession, which alone empowered the Referee to proceed summarily, jurisdiction was also vested in the Bankruptcy Court by the filing of the Lyvers intervention. Submission of a controversy to the Bankruptcy Court is an invitation to it to exercise its

jurisdiction and amounts to a consent to summary jurisdiction. *Bryan* v. *Bernheimer,* 181 U. S. 188, 197; *Harrison* v. *Chamberlain,* 271 U. S. 191, 193; *Taubell et al. Co.* v. *Fox,* 264 U. S. 426, 432; *May* v. *Henderson,* 268 U. S. 111, 116; *Whitney* v. *Barrett,* 28 Fed. (2nd) 760, 761 (C. C. A. 5th); *Board of Education of Salt Lake City* v. *Leary,* 236 Fed. 521 (C. C. A. 8th); *Gamble* v. *Daniel,* 39 Fed. (2nd) 447, 453 (C. C. A. 8th); *In re Rochford,* 124 Fed. 182, 186 (C. C. A. 8th); 5 Remington on Bankruptcy; Section 2195, page 280.

Jurisdiction of the Court was not ousted by the motion of Lyvers to withdraw his petition, after the proceedings and hearings had begun, and after affirmative relief had been asked by the Trustee in Bankruptcy in a counter-petition seeking the execution of a quitclaim deed (R. 34). Attorneys representing the intervenor appeared throughout the hearings before the Referee in Bankruptcy (R. 33). The objections to the form of the proceedings came too late. *In re Hopkins,* 229 Fed. 378, 380 (C. C. A. 2nd); *Cf. Buffalo Specialty Co.* v. *Vancleef,* 217 Fed. 91.

The recent case of *Daniel* v. *Guaranty Trust Company* (decided by this Court on March 14, 1932), is to be distinguished from the present case. In the first place, the funds there sought by the turnover order were in the possession of the adverse claimant and not the Trustee in Bankruptcy, as in the instant case. In the second place, the intervenor had petitioned for the reclamation of designated bonds, and the affirmative relief sought by the Trustee in Bankruptcy was directed to an entirely different *res,* namely, the funds in the possession of the Guaranty Trust Company; whereas, in the instant case, the affirmative relief sought by the Trustee related to the very property which the interventor in his own petition sought to recover.

The instant case is also to be distinguished from *McDonald v. Plymouth County Trust Company* (No. 714, October Term, 1931), now before this Court on certiorari. In that case the Trustee in Bankruptcy was the moving party who filed a petition with the Referee alleging that the adverse claimant had applied certain funds of the bankrupt on deposit with it to a demand note of the bankrupt held by it, with knowledge at the time, that the bankrupt was then insolvent; and that such application constituted a preference. Without filing an answer to the petition, the adverse claimant appeared at a hearing before the Referee, denied the facts set forth in the petition, and claimed the right to apply the funds on deposit with it to its debt. An issue was thus raised properly determinable, so the Circuit Court of Appeals held, in a plenary suit. The Court found that the adverse claimant refused to submit to summary proceedings before the Referee; and that his only consent to a proceeding before the Referee was on the condition that the controversy be conducted as a plenary suit. The Circuit Court of Appeals held that jurisdiction to entertain plenary suits could not be conferred upon a Referee in Bankruptcy by consent of the parties. In the case at bar, however, the intervenor invoked the jurisdiction of the Bankruptcy Court and consented to summary, not plenary, proceedings. It should be noted moreover, that in the *Plymouth* case the adverse claimant, not the Trustee in Bankruptcy was in possession of the moneys in controversy.

B.

THE ISSUE OF TITLE TO THE BILYOU LEASE TRIED UPON THE INTERVENTION OF LYVERS WAS ACTUALLY BETWEEN MIKE LYVERS AS TRUSTEE OF THE MIKE LYVERS SYNDICATE AND BARNEY, TRUSTEE OF THE BANKRUPT ESTATE.

Though Mike Lyvers was not designated as Trustee of the Mike Lyvers Syndicate in the proceedings in the Bankruptcy Court, he, nevertheless, was litigating the same issues and relying upon substantive rights identical with the claims now asserted by the petitioner, his successor in title. This is disclosed by an examination of the record in the bankruptcy proceedings and by a review of the extrinsic evidence introduced in the trial of the present action.

Whether a prior adjudication is *res adjudicata* of issues involved in a subsequent proceeding is to be determined by an examination of the entire record in the earlier action; and, where necessary, extrinsic evidence is admissible to show the precise questions before the Court. Thus it was stated by this Court in *Russell* v. *Place*, 94 U. S. 606, 608:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a

> new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

See also *Oklahoma* v. *Texas*, 256 U. S. 70, 88.

The only title that Mike Lyvers ever had to the Bilyou lease was the title acquired by him as Trustee for the Mike Lyvers Syndicate through the two conveyances executed to him by one of the Morrises (R. 141). The consideration running from Otto Morris to Mike Lyvers, Trustee, recites payment of $1.00 and other good and valuable considerations (R. 27, 29). He never individually acquired the lease in question and never pretended to hold it in any other capacity than as Trustee of the Mike Lyvers Syndicate. The record discloses that he never personally owned any oil leases (R. 140, 141).

In an earlier intervention before the Referee claiming salary due him from the Morrises, Mike Lyvers himself testified that he had no interest in the properties of the Lyvers Syndicate, except as nominal trustee (R. 140, 141). In the light of this evidence it is inconceivable that Mike Lyvers was asserting rights in his individual capacity when he intervened to reclaim the Bilyou lease. This is further supported by the last paragraph in Exhibit "A" to his petition of intervention where, included in the list of properties to be reclaimed, are the Bilyou lease "and any other properties recorded in Mike Lyvers Syndicate and Mike Lyvers Trustee in Union and Ouachita Counties, Arkansas" (R. 32).

Furthermore, the execution by Lyvers as Trustee of the quitclaim deed of October 13, 1924, and of the correction deed of February 20, 1925, stand as admissions that Lyvers understood that the order of the Bankruptcy Court to execute

the deeds was directed against him in his representative capacity; and that the proceedings before the Referee involved him as Trustee.

Parenthetically it should be noted that the quitclaim deeds were not necessary to vest in the Trustee title to the properties standing in the name of Mike Lyvers Syndicate. Title vested in the Trustee in Bankruptcy by operation of law, even prior to any order or adjudication by the Referee [Bankruptcy Act, Sec. 70(a); U. S. C. A. Tit. 11, § 110]; and, therefore, long before the quitclaim deeds were executed. The proceedings before the Referee, of course, served only to confirm, not vest, title in the Trustee. In these circumstances, the quitclaim deeds could not operate to convey title which the Trustee already had. They were desired and demanded, no doubt, just as any quitclaim deed, to cut off even the possibility of another adverse claim of title. The compelling motive, undoubtedly, was to make the properties more marketable.

Further indication that the parties to the controversy in the Bankruptcy Court were fully aware that the contest was actually between the Trustee in Bankruptcy and the nominal trustee of the Mike Lyvers Syndicate is found in the counter-petition of the Trustee in Bankruptcy. There it alleged (R. 61):

> "* * * the oil and gas leases were purchased with the properties, moneys and assets of said bankrupt estate and * * * were taken in the name of Mike Lyvers, but that said Mike Lyvers only took and held as Trustee for the benefit of said trust estate, the bankrupt herein * * * that Mike Lyvers did not pay out and had no funds with which to pay for said leases, but that he at said times was in the employ of Harry Morris as Trustee under the declaration of trust of the assets of this bankrupt estate."

This is recognition of that which was clearly apparent, namely, that the properties of the Lyvers Trust were operated with the moneys of the Gusher Syndicate and on the credit of that Syndicate and of the Morris Drilling Company.

The recitals in the order of the Referee denying intervention are significant (R. 33):

> "All of the property claimed by the intervenors was purchased with the funds of the bankrupt derived from the sale of units in the trust estate of Harry Morris Guaranteed Gusher Syndicate No. 3, the Bankrupt herein, and that the title to the various properties, including the property intervened for and more particularly set out in the various assignments introduced in evidence, was taken in the name of Mike Lyvers, and Otto L. Morris, and also in the name of Mike Lyvers, Trustee in Bankruptcy herein (sic). All of said property was merely held by said parties for the benefit of the bankrupt and they had no interest in same otherwise. They not only handled these properties in this manner but handle (sic) other properties in like manner and in the name of various syndicates for their own convenience. All of the properties belonged to a common fund, although badly commingled and hard to trace owing to the absence of the books of the various syndicates including those of the bankrupt;"

To summarize—the District Court found, and the Circuit Court affirmed: (1) That Lyvers had never held any title or claim to the Bilyou lease except as Trustee; had never done any act in relation thereto except as Trustee; and had never claimed it as his individual or personal property; and (2) that at the hearing before the Referee upon his intervention it was fully understood that he was claiming as Trustee; and the issue tried was the question of ownership of the Lyvers Syndicate properties between the bankrupt

estate of the Gusher Syndicate, on the one hand, and Lyvers, as Trustee of the Lyvers Syndicate, on the other.

It is respectfully submitted that the instant case falls within the well settled rule that a judgment in an action in which a party *in fact* litigates rights pertaining to him in a representative capacity—even though he is not designated as a party in such capacity—is conclusive in a subsequent action involving the identical rights in which the party's representative capacity is properly set out. 2 Black, Judgments (2nd Ed., 1902), Section 536; 1 Freeman, Judgments (5th Ed., 1925) Section 421; Bigelow, Estoppel (6th Ed., 1913), p. 146 and Note 2.

In point is the case of *Daniel* v. *Gum*, 45 S. W. 468 (Tenn. Ch. App. 1897). In 1891, the plaintiff in that action had executed to the defendant a deed of trust on several head of horses and some lumber as security to the defendant and another for certain promissory notes given by the plaintiff. In 1896, the defendant Gum, without designating his capacity as trustee, brought an action of replevin against the plaintiff for the horses and obtained a judgment. Thereafter he advertised the horses for sale, whereupon the plaintiff brought this bill in chancery to enjoin the sale and sought to prove that all of the notes secured by the deed of trust had been paid and that the defendant Gum was not entitled to the security. The Court found as a fact that in the prior action at law Gum, the then plaintiff, claimed a right to the horses, the subject matter of the litigation, solely under the deed of trust to him as trustee, and although the prior action had been brought by Gum, individually, the decision was held *res adjudicata* in the subsequent proceeding in equity. The Court declared:

> "The contest in that case was between John Gum, the trustee in the mortgage, and the present complainant. It is true that in that proceeding he is not styled trustee, but it appears from the case that the right he asserted was under the mortgage, and that right was as trustee. It is immaterial, therefore, in the present case, that he was not formerly entitled 'trustee' in the former case" (45 S. W. at 470).

In cases closely analogous to the present case it has been held that an adjudication in an action in which a trustee is joined as a party solely in an individual capacity, along with his *cestuis,* is a bar to a subsequent action by the trustee in his representative capacity.

In *Linton* v. *Omaha Wholesale Produce Market House Co.,* 218 Fed. 331 (C. C. A. 8th), the rule was laid down by the Court as follows:

> "It is contended by appellant's counsel that, as Adolphus F. Linton was not impleaded in the Becker suit as trustee, but as an individual, in his own right, he cannot be estopped from prosecuting this suit, in which he appears in his capacity as trustee for his children, by the judgment rendered against him in that suit. Here, too, we think the assumption is unfounded. It is true he was not designated in the caption of the Becker suit as a *trustee,* but averments are found throughout the bill in that suit which most clearly disclose that he was there charged with making a claim to the lots in question solely as trustee for his children. It is quite common and altogether proper to describe the capacity of a named defendant or his relationship to other parties in the body of the bill, without disclosing them in the style of the action at all. Not only so, but the defendants in the Becker case pleaded affirmatively that Mr. Linton held title to the lots in question for his children, and the case was tried on that issue. That issue was, therefore, not only made, but fully tried, in the Becker suit" (218 Fed. at 335).

In *Emerson-Brantingham Implement Co.* v. *Riverton Elevator Co.*, 297 Pac. 393 (Wyoming 1931), the Court held that a judgment in an action against certain persons joined individually was *res adjudicata* in a subsequent action involving the same rights and issues in which the persons were joined "as directors" of a corporation.

Numerous examples of this principle have been recognized by the courts. In separate actions, one brought under the Federal Employers Liability Act and another brought under a State Workmen's Compensation Act, a judgment in one action to which the beneficiary of recovery under a State act is a party is *res adjudicata* with respect to an issue there litigated, namely, whether the deceased was engaged in interstate commerce, in a subsequent action under the Federal law in which an administrator is the nominal party on behalf of the same beneficiary. *Chicago, R. I. & Pac. Railway Co.* v. *Schendel*, 270 U. S. 611; *Williams* v. *Southern Pacific Co.*, 54 Cal. App. 571, 202 Pac. 356.

In the *Schendel* case this Court stated:

> "The fact that the party impleaded, under the state law, was the widow, and, under the federal law, was the personal representative, does not settle the question of identity of parties. That must be determined as a matter of substance and not of mere form. The essential consideration is that it is the right of the widow, and of no one else, which was presented and adjudicated in both courts" (270 U. S. at 618).

In *Williams* v. *Southern Pacific Co.*, the principle was laid down as follows:

> "Without multiplying authorities, it may be stated as a general rule that, where one appears in a representative capacity in one action and in his individual capacity in another action, involving the same subject-matter, without any change in his relation to that subject-matter,

a judgment in the one case is conclusive of his rights in the other" (202 Pac. at 359).

In another application of this general principle, it has often been held that if a party litigates a right derived by descent as heir or next of kin of a decedent in an action in which the party appears in his individual capacity, the adjudication in that action is a bar to a subsequent suit involving the same identical right in which the same person appears as a party in the capacity of administrator or executor of the decedent.

In *Braswell* v. *Hicks*, 106 Georgia 791, 32 S. E. 861, the Court stated:

> "It is a general rule, well recognized by all the courts, that a judgment against a person as an individual will not bind him as administrator. * * * There are, however, certain exceptions to this rule. One of these is that where a person sued as an individual voluntarily pleads in that suit his rights in a representative capacity, as administrator, executor, guardian, or trustee, and the issue thus raised by his plea is passed upon by the court, a judgment in that suit binds him in both capacities, as an individual and as a representative. It is not necessary, in order that the judgment should be so binding, that an order should be taken making him a party in his representative capacity. The fact that he pleads in that capacity, and that the issue so raised by him is passed upon by the court, binds him, without a formal order making him a party in his representative capacity" (32 S. E. at 862).

See also, *Rost* v. *Heyka*, 133 Kan. 292, 299 Pac. 969; *Bowman* v. *Parks*, 166 Iowa 403, 147 N. W. 850; *Wadley* v. *Oertel*, 140 Georgia 326, 78 S. E. 912; *Kansas City, W. & N. W. R. Co.* v. *Menager*, 59 Kan. 687, 54 Pac. 1043; *Colton* v. *Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; *Manigault* v. *Holmes*, 1 Bailey Eq. 283 (S. C. 1831).

Conversely, if a person litigates an issue in an action to which he is a party as executor or administrator, the adjudication is conclusive in a subsequent action involving the same issue in which the person appears in his individual capacity. In *re Bells' Estate,* 153 Cal. 331, 95 Pac. 372, 377-378; *Brown* v. *Howard,* 92 Fed. 537 (C. C. S. D., Iowa); *Donifelser* v. *Heyl,* 7 Kan. App. 606, 52 Pac. 468, aff'd 59 Kan. 779, 54 Pac. 1059.

So also the English Courts have held that in an action in which a person appears claiming rights as next of kin of the decedent, an adjudication therein is conclusive of the same issue in an action in which the person appears as heir of the decedent. *Beardsley* v. *Beardsley* (1899) 1 Q. B. 746.

Similarly this Court has held that a decision in an action where certain persons appeared as executors was conclusive of a subsequent action against those persons as trustees; in respect of an identical issue involving a testamentary trust. *Colt* v. *Colt,* 111 U. S. 566.

Though Lyvers may not have been formally and technically designated in the intervention as Trustee, and may not have been formally referred to as Trustee in the order of the Referee, yet, inasmuch as the proceeding was actually and necessarily prosecuted by him in his representative capacity, and was so treated, the order of the Referee and of the District Court affirming it became binding upon him as Trustee and should now be treated as binding upon the appellant as his successor.

The *cestuis que trustent* of the oil and gas leases held in the name of Lyvers, as Trustee for the Syndicate, were not necessary parties to the prior action in bankruptcy in order

to make the decision in that case binding upon the *cestuis* and upon the petitioner, now their representative, in the present action. 1 Freeman, Judgments (5th Ed., 1925) Section 500; Bigelow, Estoppel (6th Ed., 1913) p. 127.

It has been repeatedly held by this Court that a judgment in an action in which the Trustee litigates and represents the equitable rights of the *cestuis* is a conclusive adjudication of the rights of the *cestuis* and is a bar to any subsequent action by them or upon their behalf in respect of the same issues. *Beals* v. *Illinois, Mo. & Texas R. R. Co.*, 133 U. S. 290; *Richter* v. *Jerome*, 123 U. S. 233; *Shaw* v. *Railroad Co.*, 100 U. S. 605; *Corcoran* v. *Chesapeake & Ohio Canal Co.*, 94 U. S. 741; *Kerrison* v. *Stewart*, 93 U. S. 155.

Similarly it has been held that the *cestuis* are not necessary parties to an action in which their trustee is joined as representative of their rights. *Vetterlein* v. *Barnes*, 124 U. S. 169; *Mathis* v. *Hemingway*, 24 Fed. (2d) 951 (C. C. A. 8th); *Woods* v. *Woodson*, 100 Fed. 515 (C. C. A. 8th); compare *Heckman* v. *U. S.*, 224 U. S. 413 (Indians represented by United States not necessary parties to action).

We further submit that the Bankruptcy Court correctly decided that title to all the Lyvers Syndicate properties, including the Bilyou lease, was in the bankrupt estate and therefore passed upon adjudication in bankruptcy to H. M. Barney, Receiver and Trustee in Bankruptcy. This for the reason that prior to the adjudication of bankruptcy of the Gusher Syndicate and Harry N. Morris, all such properties had passed by merger into the ownership of the Gusher Syndicate. Any creditor of the Gusher Syndicate could have

subjected to the payment of his claim the leases held in the name of Mike Lyvers as Trustee.

All that was originally done by the Trustee in Bankruptcy was done in recognition of and as a result of this merger. Assets nominally belonging to the Lyvers Syndicate were administered and liquidated as properties of the Gusher Syndicate for the purpose of meeting the demands of creditors whose claims had been incurred in the name of the Gusher Syndicate during the course of and as a part of the merger (R. 144).

The Referee in Bankruptcy recognized the merger by the payment of the debts of the Mike Lyvers Syndicate upon an equal basis with the debts of the Gusher Syndicate; and by the distribution of dividends to the unitholders of the Lyvers Syndicate, as deferred creditors, upon an equal pro rata basis with those of the Gusher Syndicate (R. 148).

At least five-sevenths of the unitholders of the Lyvers Syndicate sanctioned this merger *nunc pro tunc,* if not before, by acquiescence in the course of the bankruptcy proceedings and the acceptance of the bankruptcy dividends (R. 147, 156-159).

The petitioner here contends that there could be no merger of the syndicate without legal proceedings (Br. 28). Just what legal proceedings would be necessary he does not specify. No formal proceedings of any kind were required by the declaration of trust or by statute. Article XVIII, Section 1 of the trust (R. 25) expressly provides:

> "The Trustee herein named and all successors Trustee may, in his discretion, terminate this trust by merger or reorganization in any manner or form whatsoever, and nothing herein shall be deemed to construe as a limitation or restriction upon such power or authority of the Trustee * * *" (sic).

Neither consent nor even notice was required to be given to the unitholders to effect such a merger. The Trustee could accomplish a merger in any practical matter that he saw fit. And a merger will result from any conduct of the Trustee, which, as here, has the practical effect to consolidate and unify the affairs and properties in his name, as Trustee, with the affairs and properties of any similar syndicate. In respect of the merger the Circuit Court of Appeals said:

> "The trustee is given the right under this article to terminate the trust by merger *in any manner or form* whatsoever, and nothing is to be construed as a limitation upon his power in that respect. No formal proceedings are necessary and if the conduct of the trustee is such that the result is to unite the trust with another trust we see no reason why this article is not sufficient to cover that situation and permit a court to say that Lyvers had merged his syndicate with the Gusher Syndicate. He turned over all power of control and management of the Lyvers Syndicate to the Morrises; he gave one of them authority to issue checks; he allowed, if he did not actively assist in, intermingling the property of the two trusts and confusing their affairs so that they could not be unscrambled.
>
> This would seem to constitute merger 'in any manner or form whatsoever,' as provided by the Declaration of Trust. There is no question that the trusts were operated as a unit. We see no reason why the separate legal entity of a business trust cannot be merged in another business trust and such separate entity be disregarded in a case of this kind the same as it would be if these syndicate were corporations. This merger took place before the adjudication in bankruptcy, and we think the Bilyou Lease, in equity at least, became a part of the Gusher Syndicate's property prior to the adjudication in bankruptcy and hence passed to the Trustee upon such adjudication. The Trustee in Bankruptcy took possession of the assets of the Lyvers estate and liquidated them the same as he did the property of the Gusher Syndicate. The Referee in Bankruptcy paid the debts

of Lyvers, Trustee, upon an equal basis with the debts of the Gusher Syndicate" (53 Fed. (2d) 39).

In the concluding paragraph of the Circuit Court of Appeals opinion is set forth so fair a discussion of the equities in this case that we quote again:

"* * * It is true that the owners of the units in the Lyvers Syndicate have undoubtedly been swindled by the operations of Lyvers and the Morrises. Persons who buy units in a trust which confers such powers upon the trustee, as the trust articles did here, may reasonably expect trouble, and it is strange that anyone can be found to purchase units in such a trust where absolute power was given to Lyvers not only to carry on the business and to merge the trust or dispose of its property as he chose, but also to transmit his power to a successor selected by him. The equities of the creditors of both syndicates and the equities of appellee's predecessor in title were we think much stronger than the equities of the beneficial owners of the Lyvers Syndicate. There is no claim that appellee's predecessor was guilty of any fraud or wrong-doing. * * * If title did not pass to the Bilyou lease by the transfer from the trustee in bankruptcy, it did not pass as to the other properties of the Lyvers Syndicate. Such holding would undo the entire transaction after creditors have been paid and the unit holders have accepted dividends, although very meager, out of the proceeds of the sale." (53 Fed (2nd) 27, 39.)

POINT II.

The proceedings upon the petition filed by Zug, *et al.*, in a class proceeding, for the benefit of all unitholders of the Mike Lyvers Syndicate constitute *res adjudicata*.

On March 18, 1925, a petition was filed before the Referee in Bankruptcy by Zug and two other unitholders of the Mike Lyvers Syndicate (R. 62). This was done at the instance of Dr. McComb, acting on behalf of the unitholders of the Mike Lyvers Syndicate (R. 162).

The petitioners alleged that the suit was brought on behalf of themselves and all other persons similarly situated (R. 63); and in their petition set out the history of the organization of the Mike Lyvers trust; the institution of the bankruptcy proceedings against the Gusher Syndicate and Harry N. Morris, Trustee (R. 66); the denial that the Mike Lyvers Syndicate was in any sense responsible for the liabilities of the bankrupt syndicate (R. 65); the intervention proceedings brought by Mike Lyvers; the execution by Lyvers of the quitclaim deed of October 13, 1924, to H. M. Barney, Trustee in Bankruptcy; the invalidity of said deed; that it had been procured by threats, for a consideration of $600.; that it constituted a fraudulent conveyance of the interest of the petitioners and those similarly situated; and that said deed should be cancelled (R. 68). The prayer for relief in the petition was in the alternative either (1) for setting aside the sale of the Bilyou lease to the Natural Gas & Petroleum Corporation (R. 71); or (2) for an accounting of the moneys in the hands of the Trustee in Bankruptcy which money represented the pro-

ceeds of sale of the Bilyou, Mullens and Jonette leases (R. 70).

Attached to the petition was an affidavit dictated by Dr. McComb (R. 165) but signed by Mike Lyvers, in which he stated that he executed the conveyances to the Trustee in Bankruptcy under the belief that unless he did so he would be sent to prison for contempt of court; and that one of the conveyances was in consideration of the allowances of his (salary) claim in bankruptcy for $600 (R. 72). This Barney emphatically denied at the trial.

To that petition the Trustee in Bankruptcy filed a response, denying the allegations and asserting ownership in the bankrupt estate (R. 73). After a hearing upon the petition and response, the Referee in Bankruptcy entered an order denying the prayer of the petition (R. 82). No review of this order was ever sought in the District Court.

This proceeding, we submit, constitutes *res adjudicata*, estopping the petitioner from maintaining the suit at bar. The Circuit Court of Appeals did not find it necessary to consider this point because of its holding in respect of the Mike Lyvers intervention (53 Fed. (2nd) 27, 31). We here present it as a defense upon which we think that we are entitled to rely.

With respect to this defense, the petitioner contends (1) that the Referee was without jurisdiction, and (2) that the Referee's order denying the petition was not binding upon the unitholders as a class.

(1) *Jurisdiction of Referee.*

The substance of the petitioner's first contention is that the Bankruptcy Court had no power to adjudicate the issues

presented by the petition; and further, that the petition having been filed after the sale and execution of the deed to the purchaser, there was no *res* remaining in the Bankruptcy Court with reference to which title could be adjudicated.

The petitioner further argues that the issues presented by the Zug petition constituted a controversy in equity, and not a proceeding in bankruptcy, having in mind Section 23 of the Bankruptcy Act of 1898, where the distinction is there made between "controversy at law and in equity as distinguished from proceedings in bankruptcy". Jurisdiction of all controversies at law and in equity was then vested in the United States Circuit Courts. Jurisdiction over such controversies as constitute "proceedings in bankruptcy" is left to the summary jurisdiction of the Bankruptcy Court. It is now generally recognized that where property has come into the possession of the Bankruptcy Court, then, that Court has jurisdiction to determine the title to the property and the issue, accordingly, is denominated a proceeding in bankruptcy: (*In re Rochford,* 124 Fed. 182.)

Possession of the properties standing in the name of Mike Lyvers, Trustee, had been in the Bankruptcy Court since November, 1923, up until the execution of the deed of March 2, 1925, to the Natural Gas & Petroleum Corporation. The confirmation of the deed of sale by the Trustee in Bankruptcy to the Natural Gas & Petroleum Corporation did not deprive the Bankruptcy Court of the jurisdiction which it once had.

The purchaser, by operation of law, became a party to the proceeding and subject to the summary jurisdiction of the Bankruptcy Court. There is no doubt that the Bankruptcy Court, upon proper cause shown, could set aside the sale of the property and restore the property to the Mike Lyvers

Syndicate, if it so determined. *Champlin Refining Company* v. *Bailey,* 23 Fed. (2nd) 657 (C. C. A. 10th), and *Champlin Refining Company* v. *Bailey,* 36 Fed. (2nd) 655 (C. C. A. 10th). In these two cases it was held that the Bankruptcy Court had jurisdiction upon the petition of creditors of the bankrupt estate to set aside a Trustee's sale after its confirmation, the Circuit Court of Appeals for the Tenth Circuit expressly holding that such a petition presented an issue constituting "a proceeding in bankruptcy".

By the same token, the prayer of Zug, *et al.,* to set aside the sale to the Natural Gas & Petroleum Corporation presented an issue constituting "a proceeding in bankruptcy". Inasmuch as possession of the property had been in the Bankruptcy Court prior to the sale, the summary jurisdiction of the Bankruptcy Court attached to consider that prayer. *Whitney* v. *Wenman,* 198 U. S. 539.

Jurisdiction was also vested in the Bankruptcy Court to determine whether the petitioners were entitled to the alternate relief, namely, an accounting between the Mike Lyvers Syndicate and the Gusher Syndicate and a turnover of the balance received from the sale of the properties standing in the name of Mike Lyvers, Trustee. The fund or *res* out of which settlement would be made was in the hands of the Bankruptcy Court. This possession the unitholders admitted in their petition; as well as the right of the Bankruptcy Court to charge this fund with its proportionate share of the debts and expenses incurred during the joint operation of the properties both prior and subsequent to bankruptcy.

Finally, it must be remembered that the unitholders invoked the jurisdiction of the Bankruptcy Court and never challenged it.

(2) *Identity of Issues and Subject-Matter.*

The issues determined in the Zug, *et al.*, proceeding are identical with those now litigated in the case at bar; and both controversies relate to the same subject-matter.

The prayer of the petitioner for an accounting, a turnover of the balance and for general relief, presented squarely to the Bankruptcy Court the question of ownership of the properties, including the Bilyou lease, standing in the name of Mike Lyvers, Trustee. The contest in reality was between the Trustee, representing the bankrupt estate, and the Lyvers Syndicate.

The petition, summarized, admitted possession and operation of the Lyvers property by the Trustee in Bankruptcy under a joint operating agreement; denied the Trustee's right to sell those properties; asked that the sale be set aside; and at the same time prayed for a general accounting between it and the bankrupt Syndicate, and for a turnover of the proceeds of all moneys found due it as a result of the joint operation (R. 62).

The response of the Trustee categorically denied all these allegations and averred ownership in the Gusher Syndicate of all the Lyvers property, as well as of the proceeds derived from the sale and the operation of those properties (R. 73). The question of title to the Bilyou lease or ownership of the proceeds of sale was sharply in issue between the two syndicates.

(3) *Identity of Parties.*

The determination of the Referee in Bankruptcy denying the relief sought in this representative action brought by Zug, *et al.*, on behalf of all the unitholders in the Mike Lyvers

Syndicate is binding upon those unitholders who did not actually appear. Equity Rule 38 provides:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

Controlling is the rule laid down by this Court in *Smith v. Swormstedt,* 16 How. 288, 303:

> "Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

This quotation was cited with approval in *Hartford Life Insurance Co.* v. *Ibs,* 237 U. S. 662, 672.

The fact that the Natural Gas and Petroleum Corporation was not, by name, made a party defendant is immaterial; for it is a well settled doctrine that a purchaser at a judicial sale, by reason of his purchase, becomes a party to the proceeding in which the sale is had, and is, therefore, bound as a party to the record by any orders that may be subsequently made in the course of the proceeding relative to the sale. *Axelrod* v. *Osage Oil Refining Co.,* 29 Fed. (2nd) 712; *Champlin Refining Co.* v. *Bailey,* 36 Fed. (2nd) 655.

Accordingly, if the order of the Referee had been in favor of the petitioners, the Natural Gas and Petroleum Corporation would have been bound by such order; or could have challenged the order by filing a bill of review or appeal from it. The response filed by the Trustee in Bankruptcy to the petition raised all the issues that the Natural Gas and Petroleum Corporation could have raised, and that response must be treated as having been filed not only on behalf of the creditors but also on behalf of the purchaser at the sale.

We respectfully submit that the proceeding in the intervention filed by Zug and his associates, and the order of the Referee thereon, is binding as *res adjudicata* and estops the petitioner from maintaining this suit.

POINT III.

The petitioner and the unitholders of the Mike Lyvers Syndicate are estopped by laches to maintain this action.

Assuming arguendo, that the Mike Lyvers Syndicate had some claim of title to the Bilyou lease and other properties standing in the name of Mike Lyvers, Trustee, we submit that his successor Trustee and the unitholders are estopped by laches from now bringing this action.

The Courts strictly hold that those who have claims to mineral or oil property must act with the utmost diligence in bringing actions to enforce them: this for the reason that the uncertain value of the property may, in the case of development, be subject to a tremendous increase; and for the reason that it is unjust to allow one claimant to sit by while another, at his own risk, expends large sums of money in ex-

ploration and development. In *Patterson* v. *Hewitt*, 195 U. S. 309, 321, this Court said:

> "Persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

See also *Twin-lick Oil Co.* v. *Marbury*, 91 U. S. 587, 593; *Johnston* v. *Standard Mining Company*, 148 U. S. 360. A delay of two to four years has been fatal to the assertion of the claimant's rights. *Taylor* v. *Salt Creek Consol. Oil Co.*, 285 Fed. 532, 540 and cases there cited.

All the elements of laches are present in this case: (1) the invasion of the rights (assumed arguendo) of the party claiming to be owner; (2) notice on his part of such invasion; (3) delay in the prosecution of his rights; and (4) circumstances rendering it inequitable to grant the relief prayed for.

The record shows clearly that the rights of Lyvers, as Trustee, were invaded in August, 1923, when Williford, the State Receiver, took over the properties of the Mike Lyvers Syndicate (R. 141). The properties were thereafter claimed by and were in the possession of Barney, the Trustee in Bankruptcy, continuously from November, 1923, to March 2, 1925, and have since been in the possession of his grantee and its successor, this respondent (R. 142).

Notice of this invasion was brought home to Mike Lyvers, the Trustee, when Williford took possession. He knew from the beginning that Williford and then Barney had possession of and were claiming the title to the property (R. 30). He had knowledge of the sale of the properties by the Trustee in Bankruptcy to the Natural Gas and Petroleum Corporation on March 2, 1925. The subsequent development of the Bilyou lease and its great enhancement in value was known to

him (R. 163-164). The petitioner, successor Trustee to Lyvers, is charged with Lyvers knowledge.

The circumstances which brought home knowledge of the bankruptcy proceedings to the unitholders have already been stated. Suffice it to say that if there was one who did not have actual knowledge of the invasion of his rights, he was in possession of enough facts to put him on inquiry. *Johnston v. Standard Mining Company, supra,* page 370.

In spite of this notice to Mike Lyvers, Trustee, the petitioner, his successor Trustee, and the unitholders, this suit (Dec. 20, 1927) was not brought until more than four years after Barney, as Trustee in Bankruptcy, first asserted title to the properties standing in the name of Mike Lyvers, Trustee, and took possession of them; and over eighteen months after the lease had been fully developed (R. 182).

The suggestion is made by the Circuit Court of Appeals that the doctrine of laches might not apply in the case of a faithless trustee. Reference is made to the case of *Willard v. Campbell,* 77 Mont. 30, 248 Pac. 219. In that case the Trustees of a trust syndicate executed a contract between the syndicate and a joint stock company which the Trustees controlled. The contract was highly disadvantageous for the syndicate, but very profitable for the Trustees. Suit was brought against the oil company by successor Trustees to set aside the contract. In respect to the defense of laches, the Court held that the syndicate could not be bound by the failure of the faithless Trustees to bring an action to undo a transaction in which the Trustees obtained secret profits. Furthermore, it was not shown that any of the unitholders during that period had notice of the situation. That case is plainly inapplicable to the situation here.

Lyvers had nothing to gain by the Trustee in Bankruptcy's seizure of the property of the Mike Lyvers Syndicate. Indeed he sought to defeat that seizure and reclaim the property through the intervention filed by him in February, 1924. The fact that Lyvers had been indicted for conspiracy to defraud his unitholders in the organization and conduct of the trust; and had pleaded guilty in October, 1924, to such indictment, has nothing to do with his failure promptly to press a suit similar to this action (R. 117). Whatever may have been the misconduct of Lyvers in the original promotion of the trust syndicate, that misconduct in no way related to the seizure by the Trustees in Bankruptcy of the Lyvers property, or delay in bringing this action.

Lyvers remained Trustee and had the power and duty to institute suit to protect the interests of his beneficiaries. His failure to do so, therefore, constitutes laches imputable to the petitioner, his successor, and to his beneficiaries. *Cf. Mathieson* v. *Craven,* 228 Fed. 345, 379; Perryon Trusts (7th Ed.) Vol. 2, #850.

Petitioner became Trustee in October, 1925 (R. 165). In January, 1926, he filed a bill containing allegations identical with those in the case at bar in the United States District Court for the Eastern District of Arkansas. This suit was dismissed for lack of jurisdiction in April, 1927, approximately sixteen months after the institution of suit; and this delay of decision was largely attributed to petitioner's inactivity (R. 188). Another eight months elapsed between its dismissal and the institution of the case at bar. Argument is hardly necessary to demonstrate that the present suit has not been prosecuted diligently.

By the same token the unitholders have slept on their rights. With knowledge of the situation they acquiesced in

the possession and administration of the Lyvers property by the Trustee in Bankruptcy. Over two-thirds of them affirmed his right to sell the property by the acceptance of dividends on their claims as deferred creditors (R. 147).

The situation, when the Natural Gas & Petroleum Corporation purchased the Bilyou lease from the Trustee in Bankruptcy, was this: For a year and a half the properties of the Lyvers trust had been administered in bankruptcy with the knowledge, acquiescence and consent of Lyvers, as Trustee, and of his unitholders and their representatives, Dr. McComb and the Reorganization Committee. The bankruptcy proceeding, in fact, had been initiated by this committee. The unitholders, during the entire course of the bankruptcy administration had been informed of, and had indeed, by claims, affirmed the right of the Trustee in Bankruptcy to sell. The purchaser bought the properties for a valuable consideration and believed in good faith that it was acquiring indisputable title. From March 1, 1925, to January 1, 1928, $221,554.33 had been expended in a development of these properties (R. 184, 185). Diligent steps taken by those asserting claims to the Bilyou lease, always assuming their validity, would have prevented this change of position.

All of the risk was assumed by the Natural Gas and Petroleum Corporation. Had the venture proved unsuccessful, all of the money expended in drilling would have been lost, and that loss would have been borne by the purchaser and not the petitioner. No risk was assumed by the petitioner. Indeed, this action was not started until a year and a half after it had been fully developed into valuable oil property. "It is inconceivable that any controversy would have ever arisen but for the lucky strike at the mine." *Swan* v. *Daven-*

port, 119 Ia. 46, 93 N. W. 65, 66. It would be inequitable to allow the petitioner now to enjoy the profits made possible by the capital *and enterprise* of the respondent and its predecessor in title.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals was correct and should be affirmed.

Respectfully submitted,

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